Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DONNA C. LINDAMOOD,

Petitioner,

v.

OFFICE OF THE STATE ATTORNEY,
NINTH JUDICIAL CIRCUIT OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question Number One

This Court in *Price Waterhouse v. Hopkins*, established the principles of a mixed motive case which, upon the employee showing an impermissible motive of the employer for an adverse personnel decision, shifts the burden to the employer to prove it would have made the same personnel decision regardless of the impermissible motive. In the case at bar the terminating official admitted at trial that he was thinking of the Petitioner's EEOC complaints and litigation at the time the decision for termination was made. The trial court in these proceedings denied the Petitioner's request for a jury instruction under *Price Waterhouse*. The Eleventh Circuit upheld the Trial Court decision finding that the admission at trial by the terminating official that the EEOC complaints and litigation were on his mind at the time of termination of Petitioner was not direct evidence but circumstantial evidence.

The question presented is whether the evidentiary burden of a terminated employee to establish a mixed motive case requires the presentation of only direct evidence or whether evidence characterized as circumstantial evidence allows for the mixed motive burden shifting under *Price Waterhouse*.

Question Number Two

This Court in *Connick v. Myers* provided that a public sector employer would have a defense under a 42 U.S.C. § 1983 claim where the employer reasonably believed that the employee's actions were disruptive, would undermine authority and destroy close working relationships. The case sub judice is a Title VII retaliatory claim. The District Court, after hearing testimony from the terminating official of

Respondent, decided to incorporate this Court's opinion in *Connick* to the liability jury instruction for the case at bar. This jury instruction was not requested by either party.

The question presented is whether the Eleventh Circuit's approval of the district court's incorporation of this Court's opinion in *Connick v. Myers*, a 42 U.S.C. § 1983 case, into a jury instruction for a Title VII retaliation case was a sanction of a lower court's action that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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Petitioner respectfully submits this petition for a writ certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court entered an order denying Petitioner's Motion for New Trial on June 26, 2000 (Appendix of Petitioner, 9a-10a). The court of appeals' opinion (per Tjoflat, C.J., joined by Dubina and Black, JJ.) was issued on April 16, 2000 (Appendix of Petitioner 1a-8a). The court of appeals order denying the petition for rehearing and petition for rehearing en banc was filed June 20, 2001 (Petitioner's Appendix 11a-12a). These opinions have not been published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on April 16, 2001, and denied the petition for rehearing and rehearing en banc on June 20, 2001. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Title VII, as amended, 42 U.S.C. § 2000e-2(m) and 42 U.S.C. § 2000e-5(g)(2)(B) are printed in the Appendix at 15a.

STATEMENT OF THE CASE

Petitioner was employed with the Respondent from June 24, 1985 until terminated twelve and one-half (12 ½) years later on January 9, 1998. The Petitioner brought to trial at the district court a two-count lawsuit for gender discrimination and retaliation. The testimony during the trial established the fact that Petition had always received above satisfactory performance evaluations up to the time of the

termination. The last performance evaluation of Petitioner was given to her one and one-half (1 ½) hours prior to her termination. This evaluation ranked her as outstanding, meeting or exceeding expectations in fifty-eight (58) of sixty-four (64) categories, one (1) category was not marked, three (3) needed improvement and two (2) unsatisfactory.

As to the termination the Petitioner testified that no reason was given verbally or in writing. A letter dated January 9, 1998 which informed her of her termination did not specify any reasons for the termination but stated Petitioner was serving at the pleasure of the Respondent and was no longer his pleasure for her to continue in service.

The Petitioner explained at the trial that the first time she was given a reason was during a court proceeding in state court in June 1998. At this proceeding it was proffered by Respondent that there was an e-mail that Petitioner wrote on January 8, 1998. The Petitioner further testified that the Respondent had not taken progressive steps in the disciplinary process under a written manual which explains this process.

At the trial before the district court the terminating official for the Respondent testified that the Petitioner had no record of discipline. Further, this official stated that the direct supervisor for Petitioner never recommended termination and, that he, as terminating official, never asked her for a recommendation on termination. The terminating official further identified the progressive step disciplinary policy and stated that he considered discipline of e-mail violations as part of the progressive step disciplinary process. He further stated that he believes that another Assistant State Attorney who was terminated for having sexual relations with a domestic violence victim was as serious of a matter as the e-mail of Petitioner.

The terminating official made the following admission during the trial:

> Q: Is there anything else that entered your thoughts regarding the termination?
>
> A: Yes. And I said that during the time period, what entered my thoughts was the filing of the discrimination complaint, the two and one-half years of administrative litigation dealing with the EEOC and that other agency that I can never remember the name of from the State of Florida, FCHJR. . . . But I did not fire her for those reasons, though they were certainly in mind. I fired her for this e-mail, and as a last straw.

Counsel for Petitioner had argued in the trial court that the terminating official's admission that the EEOC charge was on his mind at the time of termination makes this case a mixed motive case and that he had prepared a jury instruction accordingly (Petitioner's Appendix No. 13a-14a). Petitioner argued that the Respondent now has the burden of proof to show that the reasons offered by the Respondent standing alone would have resulted in the same decision. Counsel for Petitioner reserved his objections to the instructions given by the Court when the Petitioner's counsel stated that Petitioner's proposed instruction 12 should have been accepted by the Court as a proper mixed motive case instruction under the authority of the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

The district court, after hearing testimony from the terminating official of Respondent, decided to incorporate this court's opinion in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, at 1694, 75 L. Ed. 2d 708 (1983), a 42 U.S.C. § 1983 case, into the jury instruction for the case at bar, a

Title VII retaliation suit. The jury instruction was not requested by either party. Petitioner timely objected to the incorporation of *Connick* during the jury instruction phase of the trial arguing that there is no authority to incorporate a first amendment case into a Title VII retaliation case.

The Respondent is an agency for the State of Florida which employs attorneys and staff for prosecution of criminal offenses for the Ninth Judicial Circuit, in and for the State of Florida, which consists of Orange and Osceola County.

Respondent contended the admissions of the terminating official was modified or explained by additional testimony during the trial. The Respondent argued that the jury after hearing the explanation was convinced the charge of discrimination of Petitioner had nothing to do with the termination.

As to the use of *Connick* by the court for jury instructions the Respondent maintained before the appeals court that other circuits have allowed district courts to utilize other areas of law for incorporation into jury instructions. Further, Respondent stated that the *Connick* instruction conformed to the evidence and Petitioner waived any objection by failing to object to the terminating official's testimony regarding *Connick*.

The district court having denied Petitioner's request for a jury instruction under a mixed motive theory held a hearing on May 23, 2000 on Petitioner's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. The court issued its decision in open court and entered an order denying the motion for new trial (Petitioner's Appendix 9a-10a) on June 26, 2000.

The Eleventh Circuit Court of Appeals denied the Petitioner's appeal and entered its non-published opinion on April 16, 2001. The court reviewed the terminating official's testimony at trial wherein after inquiry as to what he was thinking regarding the termination stated that he thought of the Petitioner's filing of a discrimination complaint and the two and one-half (2 ½) years of administrative litigation dealing with the EEOC and the state agency which governs discrimination complaints. He added that he did not fire her for those reasons, "though it was certainly in mind. I fired her for this e-mail, and as the last straw". The Eleventh Circuit held that testimony was not direct evidence of retaliation only circumstantial evidence. The court reasoned that the jury would have to infer that the Respondent's terminating official was lying when he stated that he did not fire Petitioner for retaliatory reasons. The decision of the Eleventh Circuit conflicts with decisions of other circuits which have required a mixed motive analysis with its resulting burden shifting to the employer regardless of whether the evidence is characterized as direct or circumstantial. Additionally, the Eleventh Circuit's decision conflicts with this Court's decision in *Price Waterhouse* since the admissions of the terminating official at trial regarding his considerations at the time of termination included an impermissible consideration, the EEOC charge and administrative litigation initiated by the Petitioner. This case at bar is a textbook example of a mixed motive case as the testimony at trial of the terminating official was not a stray remark in the workplace, was a remark by one involved in the decisionmaking process, and reflects an impermissible motive at the time of termination which requires a mixed motive analysis under *Price Waterhouse*.

As to the use of *Connick* by the district court into the jury instruction for this Title VII retaliation case the Eleventh Circuit ruled no reversible error on the theory that the jury instructions, taken together, properly explained the applicable law.

On June 20, 2001 the Eleventh Circuit denied the Petitioner's petition for rehearing and petition for rehearing en banc (Petitioner's Appendix No. 11a-12a).

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit Court of Appeals denied the Petitioner's appeal and entered its non-published opinion on April 16, 2001. The court reviewed the terminating official's testimony at trial wherein after inquiry as to what he was thinking regarding the termination stated that he thought of the Petitioner's filing of a discrimination complaint and the two and one-half (2 ½) years of administrative litigation dealing with the EEOC and the state agency which governs discrimination complaints. He added that he did not fire her for those reasons, "though they were certainly in mind. I fired her for this e-mail, and as the last straw". The Eleventh Circuit held that testimony was not direct evidence of retaliation only circumstantial evidence. The court reasoned that the jury would have to infer that the Respondent's terminating official was lying when he stated that he did not fire Petitioner for retaliatory reasons. The decision of the Eleventh Circuit conflicts with decisions of other circuits which have required a mixed motive analysis with its resulting burden shifting to the employer regardless of whether the evidence is characterized as direct or circumstantial. Additionally, the Eleventh Circuit's decision conflicts with this Court's decision in *Price Waterhouse* since the admissions of the terminating official at trial regarding his considerations at the time of this termination included an impermissible one, the EEOC charge and the administrative litigation the Petitioner initiated. The case at bar is a textbook example of a mixed motive case as the sworn testimony at trial by the terminating official of

Respondent was not a stray remark in the workplace, was a remark by one involved in the decisionmaking process, and does reflect an impermissible motive at the time of termination which will require a mixed motive analysis under *Price Waterhouse*.

The Eleventh Circuit Court further sanctioned a departure by a lower Court from the accepted and usual course of judicial proceedings. The Eleventh Circuit found no reversible error of the District Court's incorporation of this Court's decision in *Connick* to a jury instruction in Respondent's defense. *Connick* was a 42 U.S.C. § 1983 case while the case herein is a Title VII retaliation case. There is no authority for *Connick* to be placed into a Title VII case even where the employee herein, as in *Connick*, was a public employee.

I. Certiorari Is Warranted Because The Decision Below Conflicts with The Decisions Of This Court And Of Other Circuits.

The Eleventh Circuit's decision which denied Petitioner's appeal of the district court's refusal to give a jury instruction under *Price Waterhouse* conflicts with other circuits and this court. The jury instruction proposed (Petitioner's Appendix No. 13a-14a) would have shifted the burden to the Respondent, as the employer who terminated the Petitioner, to show that the permissible motive advanced by the Respondent, standing alone, would have led to the Petitioner's termination. The shifting of the burden to the employer is required where evidence shows that the employer had both a permissible motive and an impermissible motive at the time the decision was made for an adverse personnel action. In the case at bar, the Petitioner was terminated the day after she sent an e-mail that the Respondent considered offensive and insubordinate. Further, the Respondent was also frustrated with the Petitioner's claims of gender

discrimination and considered these discrimination claims at the time of the termination. This fact of considering an impermissible motive is undisputed in the record. During the trial, the terminating official, under oath, gave the following testimony:

> Q: Is there anything else that entered your thoughts regarding the termination?
>
> A: Yes. And I said that during the time period, what entered my thoughts was the filing of the discrimination complaint, the two and one-half years of administrative litigation dealing with the EEOC and that other agency that I can never remember the name of from the State of Florida, FCHJR. . . . But I did not fire her for those reasons, though they were certainly in mind. I fired her for this e-mail, and as a last straw.

It would appear that this is a textbook example of a mixed motive case in that the terminating official while claiming to have terminated the individual for a certain act of which they would have discretion, the offending e-mail, also concedes a factor in the termination, what was entering his thoughts at the time of termination, was the Petitioner's filing of a discrimination complaint, and the two and one-half years of administrative litigation dealing with the EEOC and the state agency which deals with discrimination complaints.

The Eleventh Circuit characterized the statements of the terminating official as circumstantial evidence which did not warrant a mixed motive analysis.

The Eleventh Circuit decision conflicts with other circuits as other circuits have found that a mixed motive analysis would result where permissible and impermissible motives at the time of termination are shown by either circumstantial evidence or direct evidence.

The Second Circuit in *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171 (2d Cir. 1992) vacated the district court's decision which had denied the request of the terminated employee of a burden shifting charge under *Price Waterhouse* where the district court had found that the evidence of retaliatory motive was circumstantial. The Second Circuit citing authority within that circuit, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992) held, at page 182, that a mixed motive burden shifting instruction may be established through either direct or circumstantial evidence. That court stated that circumstantial evidence must be tied directly to the alleged discriminatory animus to get a burden shifting charge and provided examples of what would not get a burden shifting charge such as stray remarks in the workplace by persons who are not involved in the pertinent decisionmaking process. In the case at bar, the statements in question are not "stray" remarks since the statements were by the terminating official himself, under oath, at the trial in this cause. Further, the terminating official was directly involved in the decisionmaking process to terminate the Petitioner and, in fact, made the decision to terminate the Petitioner. Therefore, although the Eleventh Circuit characterized the testimony as "circumstantial" it was certainly tied directly to the alleged retaliatory animus since the statements relate directly to the termination decision and make specific reference to the thoughts of the terminating official at the time of decision which included the Petitioner's EEOC charge and two and one-half years of administrative litigation regarding discrimination.

The Third Circuit in *Griffiths v. Cigna Corp.* 988 F.2d 457 (3d Cir. 1993), at page 470, expressly recognized "some uncertainty in the law about the sort of evidence a Plaintiff must show to establish a prima facie mixed motives case" The Court agreed with the Second Circuit analysis in

Ostrowski. Adopting language from *Ostrowski* the court in *Griffiths* stated,

> At a bare minimum, a Plaintiff seeking to advance a mixed motive case will have to adduce circumstantial evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . if that evidence is sufficient to permit the . . . factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision, the jury should be instructed that if it does draw that inference the Plaintiff is entitled to recover unless the employer has established by a preponderance of the evidence that the employer would have taken the same action without consideration of the impermissible factor.

"Circumstantial" evidence, or evidence wherein an "inference" may be drawn of an impermissible motive allows for the burden shifting requirements under *Price Waterhouse* according to these two circuits.

Other circuits which have weighed in on the issue in favor of direct or circumstantial evidence include the Fourth Circuit, *White v. Federal Express Corporation*, 939 F.2d 157 (4th Cir. 1991), where the court held that a burden shifting mixed motive case could occur provided, "a Plaintiff may carry its burden under ordinary principles of proof by any sufficiently probative direct or indirect evidence"; and the Eighth Circuit in *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200 (8th Cir. 1993) wherein the court stated,

> The Plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable factfinder that an illegitimate criterion actually motivated the challenged decision.

The DC Circuit in *Thomas v. National Football League Players Association*, 131 F.3d 198 (D.C. Cir. 1998) held, at page 204, the evidence to establish a mixed motive burden shifting case "may be circumstantial in nature, so long as it establishes that a discriminatory motive played a substantial role in the employment decision."

The DC Circuit in *Thomas* discusses the confusion among the circuits regarding some circuits requiring "direct" evidence to obtain the mixed motive burden shifting instruction while other circuits have allowed a mixed motive shift to occur with circumstantial evidence. The Court believed that the confusion stems from the word "direct" in Supreme Court Justice O'Connor's concurrent opinion in *Price Waterhouse*. As the *Thomas* court stated, at page 203,

> The opinion repeatedly describes the required impact of the discrimination as "substantial". . . The emphasis of Justice O'Connor's opinion is on the substantial fact requirement, not on the distinction between types of evidence.
>
> In our view, Justice O'Connor's invocation of the "direct" evidence is not intended to disqualify circumstantial evidence nor to require that the evidence signify without inference. In context, the notion of "direct" evidence in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace. Indeed, Justice O'Connor relies on circumstantial evidence in *Price Waterhouse* to show that the employer's discriminatory motive played a substantial role in the disputed employment decision.

The Court went on to state, on page 204,

> In dicta in her concurrence, Justice O'Connor describes several pieces of evidence that, taken alone, would not show that discrimination had formed a substantial factor in the employment decision, including "stray remarks in the workplace," statements by people who did not participate in the decisionmaking process, or expert testimony that an illegitimate factor "played a role" in the decision. In contrast to such evidence, Justice O'Connor says, "what is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." The word "direct" in this sentence simply distinguishes evidence that shows that an unlawful consideration constituted a substantial factor in the particular employment decision from evidence insufficiently related to the particular event.

The "direct" evidence to which Justice O'Connor eludes certainly may be circumstantial in nature, so long as it establishes that discriminatory motive played a substantial role in the employment decision. See *Griffiths v. Cigna Corp.* 988 F.2d 457, 470 (3rd Cir. 1993) (circumstantial evidence may shift burden if it "directly reflects" the alleged discriminatory attitude). Furthermore, such evidence - like all evidence short of outright admission of discriminatory motive - requires the factfinder to draw inferences. See *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171 (2nd Cir. 1992) (burden shifting requires "evidence of conduct or statements by person involved in the decisionmaking process that may be viewed as

> directly reflecting the alleged discriminatory attitude, and that . . . is sufficient to permit the factfinder to infer that the attitude was more likely than not a motivating factor in employer's decision"). *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993).

The Court in *Thomas* referred to the decisionmaking processes of the Eleventh Circuit, stating on page 205,

> Several circuits have both taken Justice O'Connor's concurrence in *Price Waterhouse* and have interpreted "direct" to mean non-inferential or non-circumstantial. See, . . . *EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990). For the reasons set forth above, we believe that the few circuits that have taken Justice O'Connor's use of the word "direct" to mean non-inferential or non-circumstantial have misread her concurring opinion and misconstrued the rule of law to be drawn from *Price Waterhouse.*

Other circuits have limited a Plaintiff's ability to obtain a mixed motive burden shifting instruction to those cases where there is direct evidence only of a impermissible factor, *see Bruno v. City of Crown Point, Indiana*, 950 F.2d 355 (7th Cir. 1992); *Brown v. East Mississippi Electric Power Association*, 989 F.2d 858 (5th Cir. 1993); and *Heim v. Utah*, 8 F.3d 1541 (10th Cir. 1993).

The Eleventh Circuit decision in the case at bar conflicts with this Court's decision in *Price Waterhouse.* The Petitioner has wrongfully had to assume a burden of persuasion she should not have had to bear. Once a mixed motive case is established the burden shifts to Defendant to prove that the "legitimate reason, standing alone, would have induced it to make the same decision, *see Price Waterhouse*, 109 S. Ct. 1775, at 1791-1792.

Without the proposed instruction by Petitioner under *Price Waterhouse* the jury instruction was prejudicial. The burden of proof on Respondent is essentially an affirmative defense. As explained by this Court in *Price Waterhouse* at 109 S. Ct. 1795,

> We hold that when a Plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the Defendant may avoid a claim of liability only by proving by a preponderance of evidence that it would have made the same decision even if they had taken the Plaintiff's gender into account.

The only difference in the submission of Petitioner before the District Court was that in place of the word "gender" in *Price Waterhouse* the District Court would have placed the word "charge of discrimination" as substitution for "gender" since this was a retaliatory termination issue.

The failure to shift the burden to Respondent is not just a theoretical argument. Prejudice is clear based on the fact that Respondent may not have met its burden if the jury had been properly instructed. The facts developed during the trial indicate that the Respondent had used its progressive step disciplinary process for e-mails previously but not with Petitioner, who had been employed for twelve and one-half (12 ½) years without any record of discipline; the terminating official gave a highly suspect reason for the need to terminate Petitioner without warning, and without the use of the progressive step disciplinary process. The reasons stated for the immediate termination was that the submission of the e-mail was a major offense that would require immediate termination equal to that of a case involving an Assistant State Attorney employed by this Respondent who had sex with a domestic violence victim which resulted in immediate

termination. However, a letter which informed the Petitioner of her termination did not specify any reason for the termination but stated Petitioner was serving at the pleasure of the Respondent and it was no longer his pleasure for her to continue in service. As stated by this court in *Price Waterhouse*, 109 S. Ct. 1791, an employer may not prevail in a mixed motives case, "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." Further prejudice is evident since when a mixed motive case is found the court will consider declaratory and injunctive relief, and attorney's fees and costs pursuant to 42 U.S.C. § 2000e-5(g)(2)(B).

Another problem with the Eleventh Circuit's conclusion which conflict's with this Court's decision in *Price Waterhouse* is the Eleventh Circuit's decision that the testimony of the terminating official was not direct evidence, since, and according to the Eleventh Circuit, "The jury would have to first infer that Vose (the terminating official) was lying when he stated that he did not fire Appellant for retaliatory reasons". Under that reasoning there could never be a case for direct evidence as long as the terminating official denies the allegations of the Plaintiff.

Certiorari is needed to resolve the conflicts among the circuit courts as to the evidentiary requisite to obtain a mixed motive burden shifting analysis and jury instruction. This is particularly compelling since in the case at bar the mixed motives articulated by the decisionmaker on the issue of termination is based on sworn testimony at trial unlike other cases where mixed motive is found by statements made by decisionmarkers as testified to, not by the decisionmaker, but, by others which in itself has credibility issues that are not present in the case at bar. Here, the Eleventh Circuit made its decision to find there is no mixed motive case because the testimony of the terminating official was not "direct

evidence" because somehow there is a credibility issue that has to be resolved hence, the Eleventh Circuit's statement, "The jury would have to first infer that Vose was lying when he stated that he did not fire Appellant for retaliatory reasons". Again, under the Eleventh Circuit Court's reasoning no Plaintiff in an employment case could have a burden shifting case merely upon the terminating official stating he did not fire the employee for retaliatory reasons.

An additional need for this Court's clarification as to the evidentiary burdens to establish a mixed motive case is apparent when mixed motive cases have been found in various circuits based on statements attributed to the decisionmaker regarding discriminatory or retaliatory animus weeks or months prior to the decisionmaking itself. In the case at bar, the Respondent's terminating official testified of his considerations at the very time termination was decided, yet, no mixed motive case was found.

An example of a case where statements are attributable to the terminating official by others months prior to the termination is *Ostrowski*. In that case the Plaintiff was terminated in April 1989. The Court found that a mixed motive case existed based on statements made by the terminating official in the late summer of 1988. Further, the testimony at the trial was not from the terminating official but from the Plaintiff's supervisor who sat in on a meeting some six months prior to the termination when the terminating official stated he was upset that the Plaintiff hired certain individuals and made specific references to the new hires' age.

The need for this Court to resolve the conflicts among the circuits over the evidentiary threshold to obtain a mixed motive case is articulated by the Second Circuit in *Tyler*. That Court stated, at page 1182, "Our initial problem is

created by the various *Price Waterhouse* opinions. While that case engendered four separate opinions in the Supreme Court, none commanded a majority of the justices." Further, the Second Circuit's decision in 1992 stated the Civil Rights Act of 1991 provides no help in the analysis. The Court stated, at page, 1183,

> In any event, the Civil Rights Act of 1991 does not address our biggest problem: Whether *Price Waterhouse* requires the Plaintiff to show "direct evidence" of discrimination as a pre-condition to shifting in the mixed motive analysis. Despite the inarguable fact that only four justices in *Price Waterhouse* would have imposed a "direct evidence" requirement for "mixed motives" cases, most circuits have engrafted this requirement into case law. However, the various circuits have about as many definitions for "direct evidence" as they do employment discrimination cases."

While *Tyler* was an ADEA case the Court, at page 1184, cited *Price Waterhouse* for the theory that, "conventional rules of civil litigation are generally applied in Title VII cases, and presumably, the same goes for ADEA cases. One of those conventional rules is that "in any lawsuit the Plaintiff may prove his case by direct or circumstantial evidence".

These conflicts and the need for resolution which presents itself in the case at bar was amplified by the fact that the Eleventh Circuit did not even cite *Price Waterhouse* despite the issue and discussion of mixed motive burden shifting analysis.

II. Certiorari Is Warranted Because The Decision Below Sanctioned A Departure By A Lower Court From The Accepted And Usual Course Of Judicial Proceedings.

The jury instruction on whether Respondent is liable for retaliation was taken right out of this Court's decision in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, at 1694, 75 L. Ed. 2d 708 (1983). The instruction given to the jury stated,

> If you decide that Plaintiff's filing of a charge of discrimination was the motivating factor for her termination, you should find for the Plaintiff. If, however, you have decided that the Defendant has demonstrated that it would have terminated the Plaintiff irrespective of the Plaintiff's filing of this charge of gender discrimination because Defendant reasonably believed the Plaintiff's actions were disruptive, would undermine authority and destroy close working relationships, then you should find for the Defendant.

The *Connick* case was a suit filed under 42 U.S.C. § 1983 under a theory of wrongful termination while the employee was exercising constitutional protected right of free speech. Instead of the instruction submitted by Petitioner, which incorporated a mixed motive analysis (*see* Petitioner's Appendix 13a-14a) which is discussed in part I of this Petition, the Court incorporated the principles established in the first amendment employment controversy of *Connick*. The citation of *Connick* was not presented by counsel for Respondent but was presented by the terminating official for Respondent who identified *Connick* as a case which governed his decisions in relation to Petitioner. The Court adopted the terminating official's theory of the case at the close of all the evidence in open court at the time

it scheduled the charge conference. The Trial Court specifically stated,

> The Defendant will love this and the Plaintiff won't like it much, but what I am talking about is the rationale of that case which says the limited first amendment interests involved here does not require that *Connick* tolerate actions which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. And then it talks about the attempt to constitutionalize employee grievances. I think that is what this case is all about.

Counsel for the Petitioner objected to the incorporation of the *Connick* case into the jury instructions as not being applicable to the case at bar. Petitioner's counsel said, "That is a First Amendment case and that should not have been incorporated into this employment, Title VII retaliation case."

Respondent claimed waiver on the grounds that Petitioner's counsel did not object to the testimony being provided by the terminating official as to his theory of how he handled Petitioner under the *Connick* case. Petitioner made a proper and timely objection to the jury instruction. No waiver could occur simply because the testimony that brought out *Connick v. Myers* was during the direct examination by Petitioner's Counsel of the terminating official as an adverse witness. The Eleventh Circuit did not find waiver and made its decision on other grounds so a waiver argument should not be applicable at this time. The Petitioner believes that Respondent is also incorrect when it maintained before the Eleventh Circuit that the jury took the evidence as a whole when it made its decision and that an inartful or vague instruction did not constitute error.

However, Petitioner maintains that the jury instruction did not provide the proper allocation of proof to Respondent by the failure of the district court to give a mixed motive instruction. The incorporation of *Connick* into the already flawed instruction compounded the error.

While the District Court has discretion on jury instructions to meet unique facts of a case employment law decisions are already unclear regarding the evidentiary burdens, proper allocations of proof and the shifting burden of proof for mixed motive cases. This Court should intervene in the case at bar and prohibit the incorporation of a first amendment case into employment law cases. In the case at bar, while the Petitioner is a public employee she did not present a case under 42 U.S.C. § 1983. The cause of action presented is a Title VII action. Parties to employment law litigation in the public sector should not be expected to have to meet or defend their case under *Connick v. Myers* standards for Title VII actions.

The Eleventh Circuit ruled that no reversible error occurred by the incorporation of the district court of *Connick* since in their opinion the jury instructions, taken together, properly explained the applicable law. However, the Eleventh Circuit approved the district court's interpretation of *Connick* which the Petitioner also brought forth as error. The District Court told the jury, "You've got the whole gist of what took place right in front of you what you've got to decide is was there some protection available to this Plaintiff with respect to her job because of these constitutional guarantees that I have discussed with you." The Court reference to constitutional guarantees is apparently a reference to the *Connick* case involving the first amendment as opposed to the correct statutory prohibitions against retaliation for a Title VII charge of discrimination. A prejudicial reversible error results when the jury is left confused because the district

court left it for the jury to decide whether Petitioner should have protections in the first place. There is no issue on whether Petitioner was protected because it is undisputed, as a matter of law, that an individual who files a charge of discrimination is protected. The Court left it open for the jury to consider whether or not to give protections to the Petitioner when it stated, "what you've got to decide is was there some protection available to this Plaintiff with respect to her job because of these constitutional guarantees that I have discussed with you."

Since there is no authority for this Court's decision in *Connick v. Myers*, a 42 U.S.C. § 1983 case, to be incorporated into a public sector employer's defense to a Title VII retaliation claim the Eleventh Circuit's approval of the District Court's adoption of *Connick v. Myers* as a defense jury instruction for this Title VII claim is such a far departure from the accepted and usual course of judicial proceedings that this Court should and must intervene.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 16, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13852
Non-Argument Calendar

D. C. Docket No. 98-00457-CV-ORL-19C

DONNA C. LINDAMOOD,

Plaintiff-Appellant,

versus

OFFICE OF THE STATE ATTORNEY,
Ninth Judicial Circuit of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 16, 2001)

Before TJOFLAT, DUBINA and BLACK, Circuit Judges

PER CURIAM:

Appellant Donna C. Lindamood appeals from a jury verdict in favor of Appellee Office of the State Attorney, Ninth Judicial Circuit of Florida (State Attorney). Appellant

sued her employer, the State Attorney, alleging discrimination on the basis of gender, 42 U.S.C. § 2000e-2(a), and retaliation for filing a charge of discrimination with the EEOC, 42 U.S.C. § 2000e-3(a). On appeal, Appellant asserts that the district court erred by (1) failing to properly instruct the jury on the retaliation claim, (2) denying her motion for judgment as a matter of law on the retaliation claim, and (3) denying her motion for a new trial. We find no reversible error and affirm.[1]

I. JURY INSTRUCTIONS

Our review of a trial court's jury instructions is limited. If the instructions accurately reflect the law, the trial judge is given broad discretion as to the style and wording employed. *See Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406, 1415 (11th Cir. 1997). On appeal, "we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569 (11th Cir. 1991) (citation omitted). When measured against this standard, if the jury charge as a whole correctly instructs the jury, even if it is technically imperfect, no reversible error has been committed. *See Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th

1. Appellant also asserts that district court erred by (1) improperly commenting on the credibility of the terminating official and the weight of the evidence, (2) denying Appellant's request to offer rebuttal testimony, and (3) excluding the testimony of two female employees, while permitting evidence regarding a male employee. After careful review, we find no merit to these contentions and affirm without further discussion. *See* 11th Cir. R. 36-1.

Cir. 1996) (citation omitted). In short, we will reverse because of an erroneous instruction "only if we are 'left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.' " *Carter v. Decision One Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997) (quoting *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982)).

In this case, the district court instructed the jury on the retaliation charge in these terms:

> If you decide that Plaintiff's filing of a charge of discrimination was the motivating factor for her termination, you should find for the Plaintiff. If, however, you have decided that the Defendant has demonstrated that it would have terminated the Plaintiff irrespective of the Plaintiff's filing of this charge of gender discrimination because Defendant reasonably believed that Plaintiff's actions were disruptive, would undermine authority and destroy close working relationships, then you should find for the Defendant.

Appellant challenges this charge on two grounds. Appellant first asserts that this instruction was improper because she offered direct evidence of retaliation. Appellant asserts that in light of this evidence the court should have instructed the jury that the case was a mixed motive case, and the instruction should have shifted the burden to Appellee to prove that a legitimate reason, standing alone, would have induced it to make the same decision.

In determining whether the instruction was improper, we must first determine whether Appellant produced direct

evidence of retaliation. Direct evidence is "evidence, which if believed, proves existence of fact in issue without inference or presumption." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (citation, emphasis, and brackets omitted). Evidence that only suggests discrimination, *see Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-82) (11th Cir. 1990), or that is subject to more than one interpretation, *see Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996) does not constitute direct evidence.

Appellant asserts that the testimony of the terminating official for the State Attorney, William C. Vose, constitutes direct evidence of retaliation. During trial, Vose offered the following testimony:

> Q: Is there anything else that entered your thoughts regarding the termination?
>
> A: Yes. And I said that during the time period, what entered my thoughts was the filing of the discrimination complaint, the two and one half years of administrative litigation dealing with the EEOC and that other agency that I can never remember the name of from the State of Florida, FCHJR. . . . But I did not fire her for those reasons, though they were certainly in my mind. I fired her for this e-mail, and as the last straw.

Contrary to Appellant's suggestion, we do not view this testimony as direct evidence of retaliation. In order for the

jury to conclude, based on the testimony cited above, that Vose actually fired Appellant for retaliatory reasons, the jury first would have to infer that Vose was lying when he stated that he did not fire Appellant for retaliatory reasons. Absent this inference, Vose's testimony does not prove that he terminated Appellant in retaliation for her filing a charge of discrimination. Thus, while Vose's testimony may provide circumstantial support for Appellant's claims, the testimony does not constitute direct evidence of retaliation.

In her second challenge to the jury instruction, Appellant asserts that the court erred in incorporating *Connick v. Myers*, 103 S. Ct. 1684 (1983) into the instruction. Appellant argues that the instruction was improper because *Connick* involved First Amendment principles not at issue in this Title VII retaliation case. Appellant further objects on the grounds that the terminating official, rather than counsel for State Attorney, injected the *Connick* theory into the case during his testimony at trial.[2]

Again, in assessing a claim that the court erred in instructing the jury, we must consider the jury instructions as a whole to determine whether the error, if any, was prejudicial. *See Johnson*, 671 F.2d at 1280. If the instructions, taken together, properly express the law applicable to the case, no reversible error has occurred, even if an isolated

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2. Vose, the terminating official, explained at trial that he did not terminate Appellant earlier, despite her objectionable conduct, because he was sensitive to the balancing of interests between an employer and an employee with respect to the right of an employee to speak out in the workplace. Vose specifically referred to *Connick* during his testimony on this issue.

clause may be inaccurate, ambiguous, incomplete, or otherwise subject to criticism. *See id.* Here, we find that, considered as a whole, the charge "sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Wilkinson*, 920 F.2d at 1569 (citation omitted). Accordingly, we conclude that the court did not commit reversible error in incorporating *Connick* as part of the jury instruction.

II. JUDGMENT AS A MATTER OF LAW

This Court reviews a district court's ruling on a motion for judgment as a matter of law de novo, applying the same legal standards as those used by the district court. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000).[3]

Judgment as a matter of law is warranted "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." Fed. R. Civ. P. 50(a)(1). We have explained:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial

3. Appellant moved for a directed verdict on the retaliation claim only. Accordingly, our review is limited to that claim.

> judgment, might reach differing conclusions, then such a motion was due to be denied and the case was properly submitted to the jury.

Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989) (footnote omitted). "The question is whether or not reasonable jurors could have concluded as this jury did based upon the evidence presented." *Griffin v. Swin-Tech Corp.*, 722 F.2d 677, 679 n.1 (11th Cir. 1984). In making this assessment, we consider the evidence in the light most favorable to the non-moving party here, Appellee. *See Carter*, 870 F.2d at 581.

Viewing the evidence in this light, we conclude that reasonable jurors could have found, by a preponderance of the evidence, that Appellee did not terminate Appellant for an unlawful reason. Appellee offered evidence that Appellant was terminated because of a pattern of disrespectful conduct against numerous individuals, culminating in Appellant's office-wide dissemination of a disrespectful e-mail disparaging the State Attorney. Although Appellant argued to the jury that Appellee's stated reason was pretext, there was sufficient evidence from which a jury could infer the opposite. Appellee testified that the termination came less than 24 hours after Appellant's dissemination of the aforementioned e-mail, and nearly three years after the filing of a charge of discrimination. We reach this conclusion mindful of the requirements under the judgment as a matter of law standard that we not weigh the evidence and that we consider the facts in the light most favorable to the non-moving party.

Appendix A

III. NEW TRIAL

The general standard by which we review new trial orders is abuse of discretion. *See Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). As we have noted, "[t]his standard recognizes the deference that is due the trial court's first-hand experience of the witnesses, their demeanor, and a context of the trial. This level of deference is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." *Id.* (citation omitted). In this case, after careful review, we conclude that the district court did not abuse its discretion in denying Appellant's motion for a new trial on both the discrimination and retaliation claims.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the jury's verdict on both the discrimination and retaliation claims.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED JUNE 26, 2000 AND FILED JUNE 30, 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No.: 98-457-C.V.-19C

DONNA C. LINDAMOOD,

Plaintiff,

v.

OFFICE OF THE STATE ATTORNEY,
NINTH JUDICIAL CIRCUIT OF FLORIDA,

Defendant.

ORDER

This cause comes before the Court on the following matters:

(1) Plaintiff, Donna C. Lindamood's, Motion for a New Trial and Memorandum of Law.

(2) Defendant's Response to Plaintiff's Motion for New Trial and Defendant's Motion for Reimbursement of Costs.

Appendix B

After hearing oral arguments on May 23, 2000 this court rules as follows:

(1) Plaintiff's Motion for New Trial is denied.

(2) Defendant's Motion for Reimbursement of Costs is granted. Pursuant to 28 U.S.C. § 1920 and Rule 54(d) Defendant's are awarded costs in the amount of $3,946.00.

(3) The clerk is directed to enter judgment against the Plaintiff and in favor of the Defendant's in the amount of $3,946.00.

It IS SO ORDERED, at New Orleans, on this 26th day of June, 2000.

s/ Peter Beer
Honorable Peter Beer
Presiding Judge

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 20, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-13852-EE

DONNA C. LINDAMOOD,

Plaintiff-Appellant,

versus

OFFICE OF THE STATE ATTORNEY,
Ninth Judicial Circuit of Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT, BLACK and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix C

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 12

ELEMENTS OF CAUSE OF ACTION—RETALIATION (MIXED MOTIVE)

Plaintiff alleges that Defendant retaliated against her on the basis of her charge of discrimination in violation of Title VII of the Civil Rights Act of 1964 when she was terminated. In order to establish that Defendant retaliated against Plaintiff because of her charge of discrimination, Plaintiff must only demonstrate that her complaint or charge of gender discrimination was a motivating factor in her termination. Plaintiff need not establish that the complaint was the only, or even the primary reason for her termination.

If you find that Plaintiff has presented evidence of conduct or statements by persons involved in the decision making process which may be viewed as directly reflecting retaliatory attitude, that evidence permits you to infer that the retaliatory attitude was more likely than not the motivating factor in the termination, and Plaintiff has proven by a preponderance of the evidence that retaliation was the reason for her termination, she need not demonstrate that Defendant's reasons are pretextual.

If you find that Plaintiff proved by a preponderance of the evidence that her charge of discrimination or EEOC complaint was at least one reason for her termination, then you must answer "Yes" to interrogatory number 2 on the verdict form. If you make this finding, Plaintiff is entitled to recover unless Defendant then proves by a preponderance of the evidence that it would have taken the same actions against Plaintiff regardless of her EEOC complaint or charge

of discrimination. It is not enough for the employer to show that it was motivated only in part by a legitimate reason. Instead, the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Defendant contends that Plaintiff's discharge was due to factors unrelated to the EEOC complaint or charge of discrimination. If you find that Plaintiff proved, by a preponderance of the evidence that the EEOC complaint or charge of discrimination was a factor in her termination, you must then determine whether Defendant proved by a preponderance of the evidence that the same decisions would have been made regardless of Plaintiff's EEOC complaint or charge of discrimination.

SOURCE: Civil Rights Act of 1991; 42 U.S.C. § 2000e-2(a); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

GIVEN: _____
REFUSED: _____
AMENDED: _____

APPENDIX E — RELEVANT STATUTES

42 U.S.C. § 2000e-2(m)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-5(g)(2)(B)

(2)(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

> **(i)** may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> **(ii)** shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * *